No. 06-[illegible] 2007

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In The
SUPREME COURT OF THE UNITED STATES

DENON KITT

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For a Writ of Certiorari
To The District of Columbia Court of Appeals

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QUESTION PRESENTED

Whether the Defendant was denied his Constitutional right of due process, as guaranteed by the Fifth and Sixth Amendments of the U.S. Constitution when the D.C. Court of Appeals allowed charges to stand when the jury was wrongly instructed on the aiding and abetting portions of the charges, thereby permitting the jury to decide the case without determining, to a reasonable doubt, each and every element of the offenses with which they were convicted, thereby violating the standards set in *In Re Winship, 397 U.S. 358 (1970). See also U.S. v. Gaudin*, 515 U.S. 506 (1995)

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OPINION BELOW

The District of Columbia Court of Appeals issued opinion No. 98-CF-1013 on August 3, 2006. The decision is reported at 904 A.2d 348 (D.C., 2006). The District of Columbia Court of Appeals denied a petition for rehearing and/or rehearing en banc on March 21, 2007. The opinion is reprinted at p. 1 of the Appendix, and the denial for rehearing is reprinted in the Appendix at p.19

JURISDICTION

The D.C. Court of Appeals filed its decision on August 3, 2006 affirming certain counts of the indictment, reversing others, and remanding the case back down to the D.C. Superior Court for a resentencing. On March 21, 2007, the D.C. Court of Appeals denied the Appellant's petition for rehearing and for rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1257(b) to review the District of Columbia Court of Appeals decision on a writ of certiorari.

U.S. CONSTITUTIONAL PROVISIONS

AMENDMENT V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district whrein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

D.C. Code § 22-1805. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or

abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

D.C. Code § 22-2803 Carjacking

(a)(1) A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle.

(2) A person convicted of carjacking shall be fined not more than $5,000 and be imprisoned for a mandatory-minimum term of not less than 7 years and a maximum term of not more than 21 years, or both.

(b)(1) A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.

(2) A person convicted of armed carjacking shall be fined not more than $10,000 and be imprisoned for a mandatory-minimum of not less than 15 years and a maximum term of not more than 40 years, or both. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 24-403.01(b-2). For purposes of imprisonment following

revocation of release authorized by § 24-403.01(b)(7), armed carjacking is a Class A felony.
Notwithstanding any other provision of law, a person convicted of carjacking shall not be released from prison prior to the expiration of 7 years from the date of the commencement of the sentence, and a person convicted of armed carjacking shall not be released from prison prior to the expiration of 15 years from the date of the commencement of the sentence.

D.C. Code § 22-2801. Robbery

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

D.C. Code § 22-4502(a)(1) Additional penalty for committing crime while armed (first offense):

(a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):
(1) May, if such person is convicted for the first time of having so committed a crime of

violence, or a dangerous crime in the District of
(2) Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to and including, 30 years for all offenses except first degree murder while armed, second degree murder while armed, first degree sexual abuse while armed, and first degree child sexual abuse while armed, and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; ...

....

(c)Any person sentenced pursuant to paragraph (1)...above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of 5 years, if sentenced to paragraph (1) of subsection (a) of this section,....

D.C. Code § 23-1331(4): Crime of Violence

The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter;

manufacture or possession of a weapon of mass destruction; mayhem; murder, robbery, sexual abuse in the first, second, or third degrees; use, dissemination or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

STATEMENT OF FACTS

Denon Kitt was charged as one of two participants in the armed robbery, abduction and murder of Jesse Lee Baker. Tried by jury separately from his alleged accomplice, Kitt was convicted of one count of first-degree premeditated murder while armed, three counts of first-degree felony murder while armed, the three predicate felonies of armed robbery, kidnapping and carjacking, and possession of a firearm during a crime of violence. The D.C. Court of Appeals reversed Kitt's premeditated murder and felony murder (carjacking) convictions for lack of proof that he had the requisite mens rea to commit these two offenses. The Court also found that the two felony murder counts merged so that [1]only one could stand. The Court of Appeals invited the trial court to select one of the felony murder counts to vacate and to vacate the underlying felony count in the other felony murder conviction.

Jesse Baker, the decedent, was the landlord of an apartment building complex located in the 3700 block of First Street, S.E., Washington, D.C. Jesse Baker visited the

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[1] On April 20, 2007, the lower Court chose to vacate the Felony Murder Charge based on armed robbery and likewise vacated the Armed Kidnapping Charge. That left the Defendant convicted of Felony Murder (Armed Kidnapping), Armed Robbery, Armed Carjacking and Possession of a Firearm during a Crime of Violence or Dangerous Offense. He resentenced the Defendant in chambers and without a hearing to from (30) thirty to life on the felony murder charge; from (5) five to (15) fifteen to run concurrent on the Possession of a firearm during a crime of violence or a dangerous offense, concurrent;from (15) fifteen to (45) forty-five years on the Armed Carjacking, to run consecutive; and from (5) five to (15) fifteen on the Armed Robbery, to run consecutive. A motion to reconsider the resentencing of the Defendant without holding a hearing at which he is present is pending.

complex on March 7, 1997 to collect rent. On that occasion, two men accosted Baker as he was about to leave, asking him "What you got, what you got?" The two then went through his pockets, removed his keys and forced him into the back of his car and drove off, with Kitt at the wheel and another man, Steven Crockett in the front passenger seat. Witnesses claimed they recognized Kitt as one of the perpetrators and identified Crockett's picture as the second man participating in the offense. Crockett was tried later and convicted of related charges for the offense.

Also on March 7, 1997, Baker's body was found in the backseat of his car in the alley of the 2200 block of Prout St., S.E., Washington, D.C. He had gunshot wounds in three places in his body, and gun shots were the cause of his death. A witness had observed Kitt in the vicinity of Prout St earlier that evening, removing his coat and running fast towards his grandmother's house. Another witness, Kitt's close friend, Tom Catlett, testified that Kitt came to him and said that "he had got into a situation that he wasn't supposed to be in" with Crockett—"a murder situation." Kitt told Catlett that "Sweets," a name Crockett goes by, unexpectedly shot someone with whom they were riding in a car." "He [Kitt] said he took his eyes off the scene for a minute and a gun went off." Catlett further testified that Crockett had displayed a .38 caliber revolver to him and Kitt a few weeks before the shooting.

The trial court, over the objection of the defendant, gave the following instruction on aiding and abetting:

> Any person who, in some way, intentionally participates in the commission of a crime, aids and abets the principal offender. He, therefore, is guilty of the crime as he would be if had personally committed each of the acts that make up the crime.

To find that the defendant aided and abetting in the committing of the crime, you must find the defendant knowingly associated himself with the person who committed the crime, that he participated in the crime as something he wished to bring about, and that he intended by his actions to make it succeed.

Some affirmative conduct by the defendant to help in planning or carrying out the crime is necessary. Mere physical presence by the defendant at the place and time the crime is committed is not, by itself, sufficient to establish his guilt. However, mere physical presence is enough if it is intended to help the principal offender and, in fact, does help him.

It is not necessary that you find that the defendant was actually present while the crime was committed.

The Government is not required to prove that anyone discussed, or agreed upon a specific time, or method of committing the crime. The Government is not required to prove that the crime was committed in the particular way planned or agreed upon, nor need the Government prove that the principal offender and the person alleged to be the aider and abettor directly communicated with each other

It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he have intended to commit the particular crime committed by the principal offender.

An aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of a crime in which he intentionally participates.

An aider and abettor is legally responsible for the principal use of a weapon during an offense if the aider and abettor had actual knowledge that some type of weapon would be used, or if it was reasonably foreseeable to the aider and abettor that some type of weapon was required to commit the offense.

It is not necessary that all of the people who committed a crime be caught or identified, nor is it necessary that the principal be identified.

It's sufficient if you find, beyond a reasonable doubt, that the crime was committed by some, and that the defendant knowingly and intentionally aided and abetted the principal offender in committing the crime.

It's not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he have intended to commit the particular crime committed by the principal offender.

An aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of a crime in which he intentionally participates. In any event, you may not convict Mr. Kitt of any count in this indictment unless you find, beyond a reasonable doubt, that Mr. Kitt was one of the two men

who forced Mr. Baker into the car.

With reference to the felonies of carjacking, the Court gave instructions that the essential elements of carjacking while armed included: (1) that the defendant took a motor vehicle from the immediate, actual possession of the complainant against the complainant's will, or that he aided and abetted the perpetrator in so doing, (2) that he, or someone he aided and abetted, knowingly used force or violence to take the motor vehicle by using actual physical force or violence, or taking the motor vehicle by putting the complainant in fear and (3) that the defendant, or someone he aided and abetted, was armed with a pistol when he committed the carjacking.

With reference to the Armed Robbery, the Court instructed the jury that the elements include: (1) the defendant, or someone he aided or abetted, took property of some value from the complainant against the Complainant's will; (2) The defendant, or someone he aided or abetted, took the property from the immediate actual possession of the complainant, or from the complainant's person; (3) the defendant, or someone he aided or abetted, used force or violence to take the property; (4) the defendant, or someone he aided or abetted, carried the property away; (5) the defendant, or someone he aided or abetted, took the property without right to it and with the specific intent to steal it; (6) that when the robbery was committed, the defendant or someone he aided and abetted was armed with a pistol.

With reference to Armed Kidnapping, the Court instructed the jury that the elements include: (1) that the defendant, or someone he aided or abetted, intentionally seized, confined, abducted or carried away the complainant against his will; (2) that he acted consciously means to act

consciously, voluntarily and on purpose, not mistakenly, accidentally or inadvertently; (3) that the defendant, or someone he aided and abetted, held or detained or acted with a specific intent to hold or to detain the complainant or the principals on purpose and (4) that the defendant, or the person he aided and abetted, was armed with a pistol when he committed the kidnapping. The Government must prove that the complainant was seized by use of coercion. If the complainant submitted to such seizure or detention, the Government must prove that the complainant did so involuntarily. Acts of coercion must be committed with the specific intent to confine the complainant. Coercion may be mental or physical coercion. The kidnapping does not have to be for monetary gain or for an illegal purpose, but may be for any purpose that the defendant or the principal believes might benefit him.

With reference to Felony Murder, the Court instructed, that the essential elements of felony murder while armed are: (1) that the Defendant, or someone he aided and abetted, shot Jesse Baker with a pistol that caused his death; (2) that the defendant, or someone he aided or abetted, was armed with a pistol when he did so, and (3) that the defendant, or someone he aided and abetted, shot Jesse Baker while attempting to commit armed robbery, kidnapping or armed carjacking, as the case might be.

It is not necessary to find that the person who caused Mr. Baker's death did so with the specific intent to kill him. Any killing, even if done without a specific intent to kill, and even if accidental, is murder in the first degree if committed in the perpetration, or attempt to perpetrate, an armed robbery, kidnapping while armed, or armed carjacking.

Two or more people acting together committing or attempting to commit armed robbery, armed kidnapping, or armed carjacking, and one of them, in the course of the felony and in furtherance of the common purpose to commit

the felony, kills a human being, both the person who committed the killing and the person or persons who aided and abetted in the felony, are guilty of felony murder.

Any person who aids and abets the commission of a felony is guilty of felony murder for a killing that was committed in furtherance of a common purpose to commit that felony, or killing, that that was in the ordinary course of things, a natural and probable consequence of acts done in committing that felony.

With reference to the charge of Possession of a Firearm during a Crime of Violence, the Court informed the jury that the essential elements include: (1) that the defendant, or someone he aided and abetted, possessed a pistol; (2) that the defendant, or someone he aided and abetted, possessed a pistol or imitation pistol while committing a crime of violence, and (3) that the defendant, or someone he aided and abetted, possessed a pistol or imitation pistol, knowingly and intentionally. This means consciously, voluntarily and on purpose, not mistakenly, accidentally, or inadvertently. The offense of armed robbery, kidnapping while armed, armed carjacking, first degree murder while armed, felony murder and premeditated first degree murder while armed and second degree murder while armed are crimes of violence.

If you are not convinced that the Government has proven beyond a reasonable doubt all the elements of at least one of these crimes of violence, then you must find the defendant not guilty of this offense.

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO TAKE THIS CASE TO DEMONSTRATE THAT THE DICTATES OF THE *IN RE WINSHIP* CASE AND ITS PROGENY CANNOT BE DILUTED TO VIOLATE THE 5TH AND 6TH AMENDMENT PROTECTIONS THAT THE GOVERNMENT HAS THE BURDEN TO PROVE EACH AND EVERY ELEMENT OF EACH AND EVERY COUNT.

In the instant case, the trial court gave instructions to the jury which, by operation of the aiding and abetting instruction, negated the instructions of the Court regarding the elements of the offense and the need to find each and every element beyond a reasonable doubt in order to find the defendant guilty. This complaint about the instructions was one of the very grounds upon which the defendant appealed to the District of Columbia Court of Appeals.

Oddly enough, the Court of Appeals agreed with us about the impropriety of using the very aiding and abetting instruction which was used in this case, and as a result of that agreement, they vacated two of the charges. However, they have refused to vacate the other charges, all of which have a specific intent element somewhere within them and have been allowed to stand despite the fact that, if the jury followed the aiding and abetting instructions as the trial court gave them, they could have convicted the defendant of all of the charges without finding that he had the specific intent to commit any of them.

Robbery is a specific intent crime; kidnapping is a specific intent crime; carjacking is a specific intent crime; possession of a prohibited weapon during a crime of violence is a specific intent crime; and felony murder, while not totally a specific intent crime, requires that the

underlying felony is a specific intent crime. The Appellate Court specifically ruled in the instant case, stating at p. 11 of the Appendix:

> Although *Wilson-Bey* [903 A.2d 818 (D.C. App. 2006] addressed accomplice liability for first-degree premeditated murder, its reasoning and holding apply to other aiding and abetting situations in which an accomplice is charged with an offense requiring proof of specific intent. In all such situations, the rule is exactly the same: where a specific *mens rea* is an element of a criminal offense, a defendant must have had that *mens rea* himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor.

Despite this very clear statement that the mens rea element between a principal and an aider and abettor must be the same, the Court refused to reverse and to remand for a new trial the other felonies which contain a mens rea element. While the Petitioner pointed out this very point to the D.C. Court of Appeals in its petition for rehearing and/or suggestion for rehearing en banc, the Court refused to reconsider its ruling and denied the motion for rehearing and for suggestion for rehearing en banc.

To permit a person to be convicted of one crime because they participate in another crime is to violate the requirements of *In Re Winship*, 397 U.S. 358 (1970) and thus the requirements of the 5th and 6th Amendments to the U.S. Constitution. That case requires that each and every element of each and every charge be determined by a jury at a standard of beyond a reasonable doubt. Indeed, the stricture is so strict that a judge is not permitted to decide one of the elements of a criminal conviction. See *U.S. v. Gaudin*, 515 U.S. 506 (1995). This Court has not hesitated

to consider the evidence and to find out whether or not each element has been decided beyond a reasonable doubt. See *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Adderley et al v. Florida,* 385 U.S. 39 (1966); *Gregory v. City of Chicago,* 394 U.S. 111 (1969); *Douglas v. Buden, Judge*, 412 U.S. 430 (1973); *Vachon v. New Hampshire,* 414 U.S. 478 (1974).

The instructions given to the jury in the instant case permit a person to be convicted of another crime merely because they are aiding and abetting a person in one crime and another crime is committed by the codefendant without the knowledge or intent of the first person. The jury was not told which crime could form the basis for transferred liability. Indeed, the jury was told that the intent to commit any crime by Mr. Kitt would form the basis for his conviction for any other crime that the codefendant committed, whether he intended or not. Nor is there any way to know what role the incorrect aiding and abetting instruction played in the jury's decision to convict on any one charge. Each of these crimes has a specific intent element. Since we do not know what crime the jury used to piggy back all of the others to find transferred guilt, the only solution is to vacate them all and to remand the case back for a new trial.

The instant conviction came out of the District of Columbia, the Superior Court. That Court is an Article I Court under the U.S. Constitution, but it is treated as a state court for many purposes. However, there is no question that this Court can examine a conviction from either a state court or a federal court to determine that it complies with *In Re Winship*, supra, standards. See *Jackson v. Virginia et al.*, 443 U.S. 307 (1979).

II. THE CHARGE OF POSSESSION OF A PROHIBITED WEAPON DURING A CRIME OF VIOLENCE IS

PARTICULARLY SUSPECT BECAUSE THERE IS NO EVIDENCE THAT PETITIONER POSSESSED A GUN DURING THIS INCIDENT AND THAT THERE IS NO EVIDENCE THAT CROCKETT'S GUN WAS EVER USED OR THAT THE PETITIONER SAW THE GUN UNTIL IT WAS USED TO SHOOT THE DECEDENT. THUS, THERE WAS NO EVIDENCE THAT THE PETITIONER KNEW THAT CROCKETT HAD A GUN.

The instruction on the possession of a prohibited weapon is particularly troubling because there is no evidence that the Petitioner even knew that Crockett possessed a gun. No one saw a gun on either man when Mr. Baker was taken into his car, and there were a lot of witnesses to the taking of Mr. Baker. The gun could have been located in Mr. Baker's car. Indeed, if it were in the glove compartment, Mr. Crockett was sitting on that side and well could have located it. This case is important to the whole country because guns are located all over the country and many such cases occur in the country where there are two perpetrators. No one can say that it is harmless to convict someone of possessing a gun where there is no evidence that he knew that the other man had a gun. Many jurisdictions have been passing enhancement statutes, and this Court should want to see that their implementation is fair and in accord with the key principles of our country. To convict someone based on the behavior solely of some other person offends our natural notions of fairness. Where the jury could only be confused by some right and some wrong instructions, the public cannot have an abiding belief that fairness ensued in the administration of justice. Only under extraordinary circumstances should the behavior of one person affect the guilt or innocence of another person. Such a situation is permitted in conspiracy cases, but no one was charged with conspiracy in the instant case. This Court should guide the country on when to have transferred guilt,

and how to preserve that most precious of rights, the right for each person to be convicted only after each element has been proven beyond a reasonable doubt.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the District of Colubmia Court of Appeals and remand it for a new trial.

Respectfully submitted,

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